IN THE HIGH COURT OF BOMBAY AT GOA
****

WRIT PETITION NO. 350 OF 2002

1. Shri Claudio Michael
D'Souza, and

2. Smt. Nila D'Souza,
both are represented
by their Constituted
Attorney, Shri Dayabhai
C. Patel, major of age,
r/o 104/A Bldg., B-Parra
Tower, Jackni Parra,
Bardez, Goa. ... Petitioners.

Versus

1. Smt. Esmeralda Fernandes,
major of age, housewife,

2. Smt. Julie Fernandes,
major of age, housewife,

3. Shri Lazaro Fernandes,
major of age,

4. Shri Alex Fernandes,
major of age,

5. Shri Anthony Fernandes,
major of age,

6. Shri Agnelo Fernandes,
major of age,

7. Smt. Sabina Fernandes,
major of age,

8. Smt. Perpetua Fernandes,
major of age,

9. Smt. Bernardine Fernandes,
major of age,
all at sr. nos. 1 to 9 are
r/o Jackni Wada, Parra,
Bardez, Goa,

10. Shri Jerry Nogueira,
major of age, r/o
H. No.65, Jackni Wada,
Parra, Bardez, Goa,

11. Ms. Marie Nogueira,
major of age,
r/o H. No. 65, Jackni Wada,

Parra, Bardez, Goa, and

12. Ms. Domnic Nogueira,
major of age, r/o H.No.
65/1, Jackni Wada,
Parra, Bardez, Goa. ...Respondents.

Shri S. D. Lotlikar, Senior advocate with Shri A. D. Bhobe, advocate for the petitioners.

Shri J. P. Mulgaokar, advocate for respondents no. 1 to 9, 11 and 12.

Shri R. Satardekar, advocate for respondent no.10.

CORAM: P. V. KAKADE, J.

DATE OF RESERVING THE JUDGMENT:29th November, 2002.

DATE OF PRONOUNCING THE JUDGMENT:5th December, 2002.

JUDGMENT

Rule. Rule made returnable forthwith by consent of both the parties.

2. Heard Shri S. D. Lotlikar, learned Senior Counsel for the petitioners and Shri Mulgaokar, learned counsel for the respondents no.1 to 9, 11 and 12, with whose help the entire record was perused.

This Writ Petition under Article 227 of the Indian Constitution is preferred against the Judgment and Order passed by the Additional District Judge, Panaji, dated 8th May, 2002, in Miscellaneous Civil Appeal No. 19/02 whereby the petitioners' application for temporary injunction in Civil Miscellaneous Application No.37/2001/I/Addl. was dismissed and the application of temporary injunction moved by the present respondents in Civil Miscellaneous

Application No.67/2001/I/Addl. was granted, and the present petitioners were restrained from carrying out any construction or interfering in any manner with the access of two metres existing in the property under survey no. 124/21 to go to the well, chapel, temple and tinto.

The facts giving rise to the dispute in a nut-shell are thus:-

The petitioners have come with a case that they filed the Civil Suit in the Court of the Addl. Civil Judge, Junior Division, Mapusa, being Regular Civil Suit No.19/2001/JR.I, against the present respondents submitting that they were the lawful owners in possession of the property situated at Village Parra surveyed under no.124/21. The property was bounded on the southern side by the property bearing survey no.123 sub-divisions 1 and 2 belonging to one Antonio Graca Da Costa. The respondents no.1 to 9/original defendants no.1 to 9, are residing in the property of the said Da Costa and respondents no. 10 to 12 are residing far away from the suit property. In the month of August, 2000, the petitioners, who are interested in developing the suit property, entered into a development agreement with a firm by name M/s JEF Constructions and after complying with the legal formalities and obtaining the necessary licences and approvals from the concerned authorities, including the Town and Country Planning

Authority and the local Panchayat, the construction in the suit property commenced. The property bearing survey no. 123/1 and 2 belonging to the said Da Costa constituted, in fact, one property which is bounded on its West by the Parra-Saligao road. The access for the residents of the said locality was always through the property surveyed under survey no.123/1. Since a small southern corner part of the suit property and that of the property surveyed under survey No.124/24 belonged to JEF Constructions are lying in line with the bund which forms part of the property surveyed under no.123/1, for which the access lies, at the request of the respondents no.1 to 9, M/s JEF Constructions had left a space of one metre in their property towards the southern side, so that the access to the respondents' property surveyed under survey no.123/2, would be straighter and wider. This is the access that the respondents no.1 to 9 have been in fact always using.

On 22nd December, 2000, the respondents lodged a complaint before the local Panchayat alleging that the petitioners' builder was obstructing the traditional access passing through the property surveyed under nos.124/21, 124/24 and 124/25. The said complaint was heard on merits and the Panchayat authorities found that a false complaint was filed by respondents no.1 to 9, as it was discovered that the petitioners' builder had in no way obstructed the said access. However, the respondents continued to harass

the petitioners and their builder by causing obstruction to the construction which was in progress and in order to extract money out of the petitioners and their builder and when they did not succeed in doing so, they started physically interfering in the suit property and the construction going thereon, by issuing threats to the labourers. In view of this position, the petitioners filed the suit and prayed that the respondents be restrained from in any manner interfering with the suit property. Alongwith the plaint the petitioners also filed an application for temporary injunction.

In the course of their written statement filed in the suit, the respondents came with a plea of an entirely different access than the one which was claimed by them before the Village Panchayat and the access now claimed, besides passing through the suit property, travelled through several survey numbers, including survey nos.123/2, 123/4, 124/8, 124/11, 124/15, 124/21, 124/22 and 124/3, as well as 124/17 and 124/23, belonging to different owners. The respondents also filed a counter-claim alongwith their written statement, claiming that they have a traditional access through the middle of the suit property and sought a declaration to that effect, as also easement, that they were entitled to draw and take water from the well situated in the suit property. They also filed a temporary injunction application to restrain the petitioners from

interfering with the use and enjoyment of the alleged access and from preventing them from drawing, taking and using the water from the well. In order to lend support to their claim, the respondents went even to the extent of demolishing a part of the compound wall constructed by the petitioners on the southern side of their property.

3. The learned trial Court after considering the pleadings of both the parties, came to the conclusion that the respondents had failed to make out any case and, therefore, issued temporary injunction in favour of the petitioners, rejecting the application for temporary injunction filed by the respondents. The respondents preferred an appeal against the aforesaid order by filing Misc. Civil Appeal No.19/2002. The learned Additional District Judge was pleased to allow the said appeal thereby restraining the petitioners from carrying out any construction or interfering in any manner with the alleged access through the property surveyed under no.124/21.

Civil Revision Application No.173/02 was filed in this Court by the petitioners during the course of which this Court appointed a Court Commissioner to visit the site and submit a report, which is on record. In the meantime, the Civil Revision Application was dismissed as withdrawn with liberty to take appropriate proceedings as a result of which the present Writ Petition has been filed.

4. Now, at the outset, it may be noted that the issue involved in the present proceedings is two-fold, namely, firstly , whether there is any right of way to the present respondents through the property belonging to the petitioners, which is under construction, and secondly, whether the petitioners would be entitled to temporary injunction against the respondents, on the ground that they are obstructing the construction activities with mala fide intention, inspite of the fact that they have a proper access made available for their purpose, by the petitioner.

5. The photographs, Exh.'A', annexed to the petition show that in fact there is a one metre wide access along the compound wall of the new construction evidently made by the petitioners, or on their behalf, as alleged by them. Moreover, the photograph, Exh. 'G' produced by the petitioners also shows that the compound wall is demolished at a particular point allegedly with the intention to show that there is an access for the respondents from that point. I have also perused the Report of the Court Commissioner and the rough sketch drawn by him.

Having considered all the material aspects on the basis of the available record, I am of the view that there is sufficient evidence on record to show that the suit property originally belonged to one Francisco Xavier D'Souza and his wife. There is also no dispute that the

name of Fatima D'Souza is shown in the record of rights. The plaintiffs have produced the record of rights as also the succession deed and will deed, which clearly indicate that the property originally belonged to the said Francisco Xavier D'Souza and his wife. Prima facie, therefore, it would be seen that the plaintiffs, who claimed to be the legal heirs of the said Francisco Xavier D'Souza, are the successors in title. On the other hand, no legal or proprietory right to the suit property, has either been claimed or established on behalf of the respondents. Therefore, once it is prima facie established that the petitioners/original plaintiffs are the owners of the property, it would be clearly seen that the defendants had no right or interest in the property, especially when there is no reliable evidence on record to show that they had access as claimed by them, over the suit property.

6. The record shows that the respondents had filed a complaint to the Panchayat on 22nd December, 2000, wherein they claimed that they were using the access to the main Parra-Saligao road, through the survey nos. 124/21. 124/24 and 124/25, which, according to them has been blocked by the construction activity which is made by the petitioners. According to the said complaint, the said land belonged to one Michael D'Souza, who has handed over the said land for development to one Patel. Incidentally, the respondents have feigned ignorance of the said letter

and have even disputed their signatures, as can be seen from the contents of the written statement. Apparently, the signatures appearing on the said complaint dated 22nd December, 2000, are those of the respondents and, for the purpose of prima facie evidence, the observation made by the trial Court to that effect has to be accepted.

In the background of these aspects, there is no dispute that there is a compound wall on the southern side of the property surveyed under No.124/24, constructed in the year 1999/2000, prior to the complaint made by the respondents and the same was constructed on the same line by leaving an access of the width of one metre. The inspection of the said property was evidently made on 9th January, 2001, in the presence of both the parties and the Panchayat Secretary and it was found that M/s JEF Constructions had already left a way to the main Saligao road, which was contrary to the contents of the complaint made by the respondents. It is also mentioned in the said letter that upon request of the defendants to go to the chapel, the Sarpanch requested M/s. JEF Constructions to leave one metre space on the eastern side of the said property. The above-noted letter of the Sarpanch clearly indicates that the way leading to the Saligao road has not been blocked and even a way or access to go to the chapel has been kept at the request of the said Sarpanch, which the plaintiffs had also agreed to maintain in the plan. It

is also obvious from the record that the case sought to be set up by the respondents in their written statement/counter-claim is prima facie seen to be an afterthought and, therefore, the learned trial Judge had rightly discarded the same while coming to the conclusion that the petitioners/plaintiffs had proved their prima facie case regarding their application for temporary injunction.

7. This reasoning adopted by the learned trial Judge came to be discarded by the learned Additional District Judge on various points. The learned Additional District Judge was of the view that the mere fact that in the letter dated 22nd December, 2000, the respondents stated that the access passed through survey nos.124/24 and 124/25 which were situated on the northern side of the property surveyed under survey no.123/1, would not, by itself mean that there is no access through the property surveyed under no.124/21. In my considered view, this a strange statement. While determining the issue at the prima facie stage, the Court is always led by the contents of the documents produced on record. When the letter of the respondents made specific mention of the access road going through survey nos. 124/24 and 124/25, without mentioning survey no.124/21, then the learned Additional District Judge was not right in substituting his own surmise in place of the statement made by the respondents

in black and white in the impugned letter. Similarly, when it was pointed out that that was the shortest way of access to the respondents to go to the main road, the lower Appellate Judge observed that there may be a way which is shortest and can be made use of by them, but this fact does not indicate that the traditional access is not existing. By observing so, in my considered view, the learned Additional District Judge has again fallen in error in introducing a conjecture which is not based upon the evidence on record, to hold that there is a traditional way through the property of the petitioners, which he ultimately found sufficient to hold that the access should go right through the construction which was being made on behalf of the petitioners, after obtaining all lawful permissions and licences.

Shri Mulgaokar, learned counsel for the respondent no. 1 to 9, 11 and 12, brought to my notice that interference by this Court under the powers vested in it by virtue of Article 227 of the Indian Constitution should be sparingly used, especially while disturbing the finding of fact. However, there is no dispute in that regard that such power can be exercised to correct errors of jurisdiction and the like, but not to upset pure finding of fact, unless there is apparent perversity in the finding recorded by the lower court. In the present case before us, I am satisfied that the finding recorded by the learned

Additional District Judge indeed is perverse as pointed out above, in order to hold that there exists a way of access right through the petitioners' property whereon the construction is made by him through a lawful agency. This is specially so when admittedly there is a way in existence kept by the petitioners on the request of the authorities of the Panchayat as well as the respondents, to go to chapel, temple, etc., which is of the width of one metre, as demonstrated in the photographs Exh.'A'. Therefore, I am of the considered view that the facts and circumstances revealed from this petition are sufficient to indicate that it is a fit case for interference by this Court under the provisions of Article 227 of the Indian Constitution.

8. Thus, I have come to the conclusion, from the available record, that the Judgment and Order passed by the Additional District Judge, Panaji, dated 8th May, 2002, cannot be sustained in law and, therefore, has to be set aside.

In the result, the Rule is made absolute and the petition is allowed in terms of prayer Clause (a). No order as to costs.

P. V. KAKADE, J.

At this stage, the learned counsel for the respondents prays for stay of this Order. The prayer is refused.

P. V. KAKADE, J.

mc.